University of Maryland
Global Campus

Investigator Training

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Title IX Investigator Training

Title IX Fundamentals

- Refresher on current Title IX legal requirements and expectations of campus Title IX investigators.
- Brief review of proposed changes under pending regulations and what to expect moving forward.

The Investigative Process

- Best practices in evidence collection, witness interviews, and overall case management.
- How to avoid potential legal pitfalls.
- Understanding and differentiating evidence: related-to, relevancy, privileged and protected evidence.

Report Writing

- Understand the essential components of a Title IX investigation report.
- Tips and techniques for clear, concise, and objective writing that accurately captures the details and findings of the investigation.
- Ensure reports are compliant with legal standards and institutional policies.

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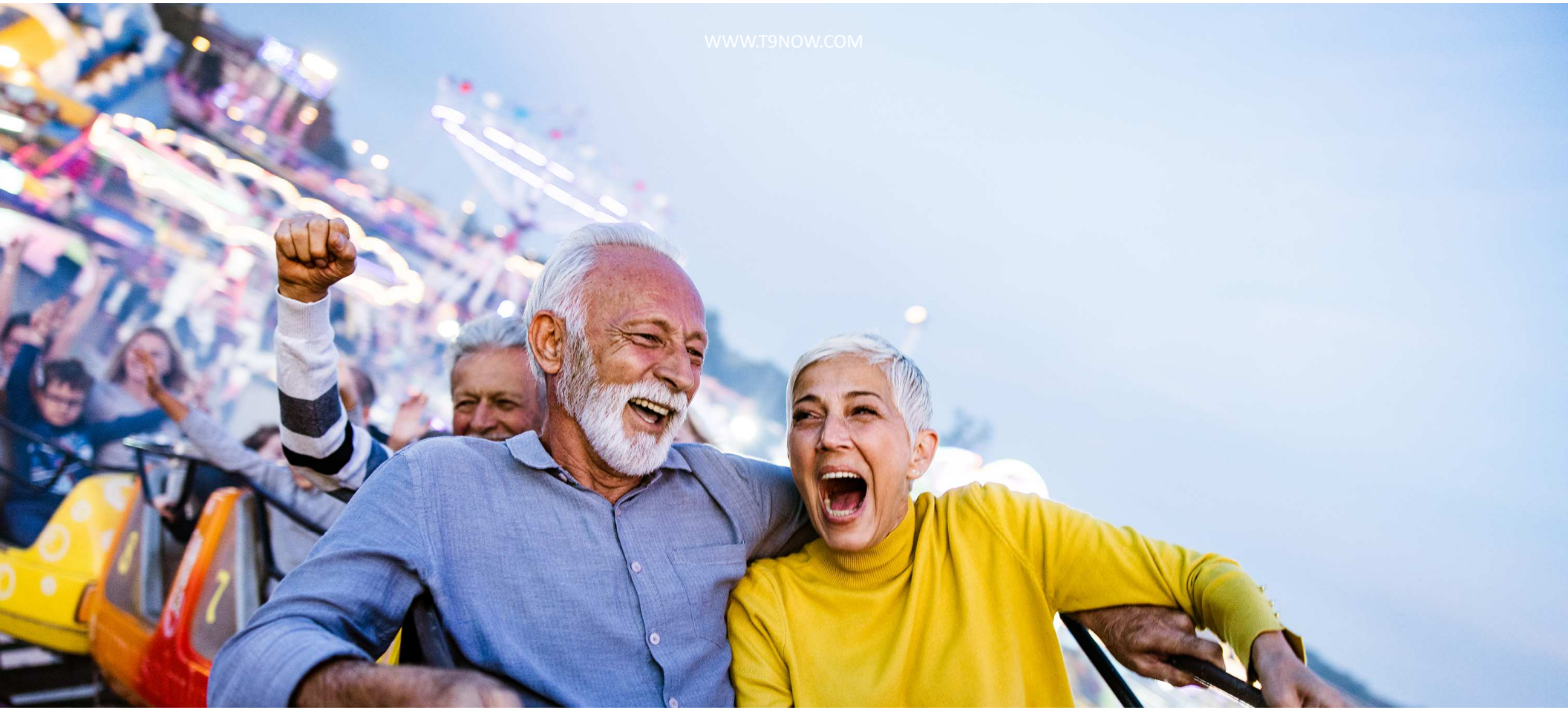
Current Title IX Investigator Training Requirements

- ✓*On Title IX's definition of "sexual harassment"*
- ✓*On the scope of the school's education program or activity*
- ✓*On how to serve impartially, including by avoiding prejudgment of the facts at issue*
- ✓*On how to avoid conflicts of interest and bias*
- ✓*On how to conduct an investigation*
- ✓*Evidence: Relevancy, Privilege, Exclusions*

Title IX Timeline: Recent Developments

- **August 2020 Trump overhaul of Title IX regulations effective**
- **June/July 2022 Biden proposed changes to Title IX regs**
- **April 2023 Biden proposed changes to Title IX athletics rule**
- **May 2023 final rules anticipated**
- **October 2023 final rules anticipated**
- **Final Rules TBD!**



The Title IX Roller Coaster

Proposed Title IX Rule

- Scope & Application
- Sex-Based Discrimination
- Sex-Based Harassment
- Notice, Reporting & Monitoring
- Pregnancy & Related Conditions
- Supportive Measures
- Grievance Procedures
- Informal Resolution
- Training

Current Definition of Sexual Harassment 3-Prongs

Quid Pro Quo

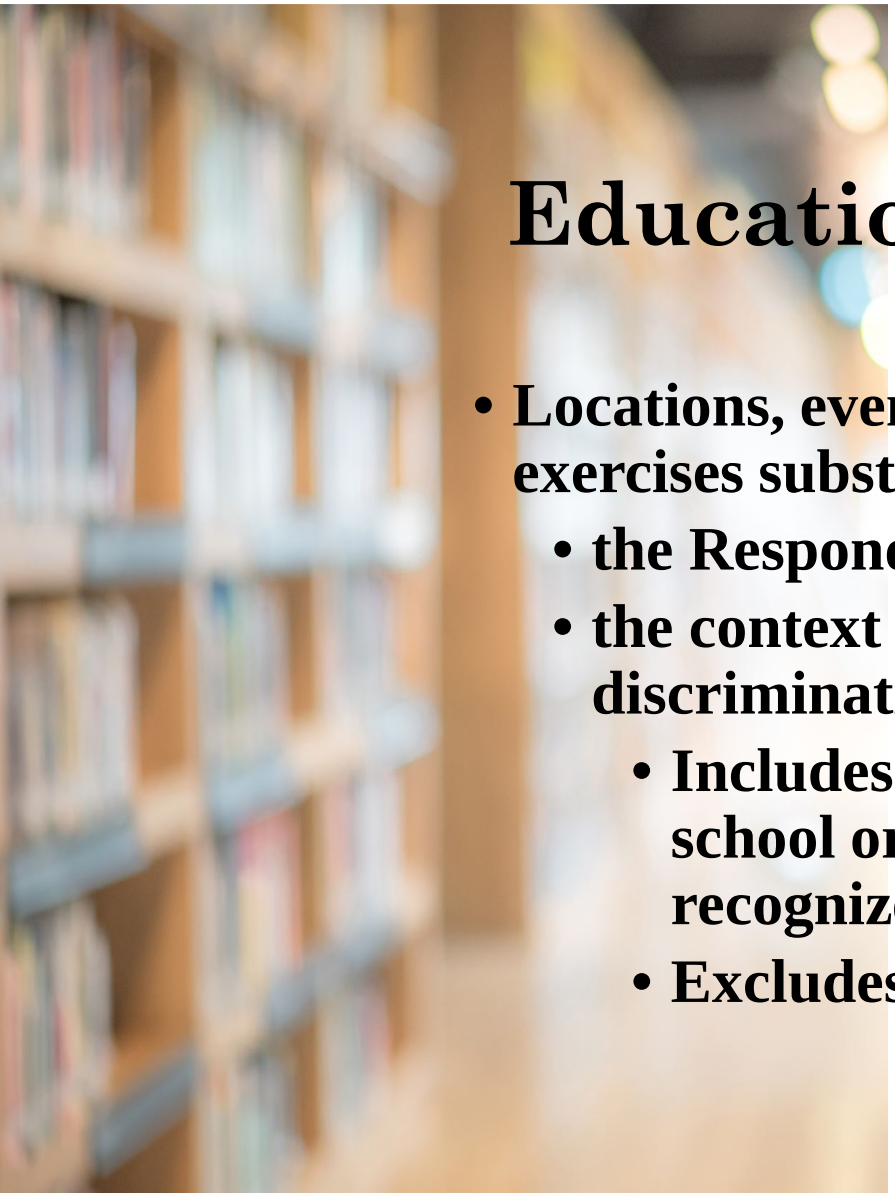
- ***Employee* Conditions Something of Value for Sexual Favor**

Hostile Environment

- **So Severe AND Pervasive and Objectively Offensive**

VAWA Crimes

- **Sexual Assault, Stalking, Dating & Domestic Violence**



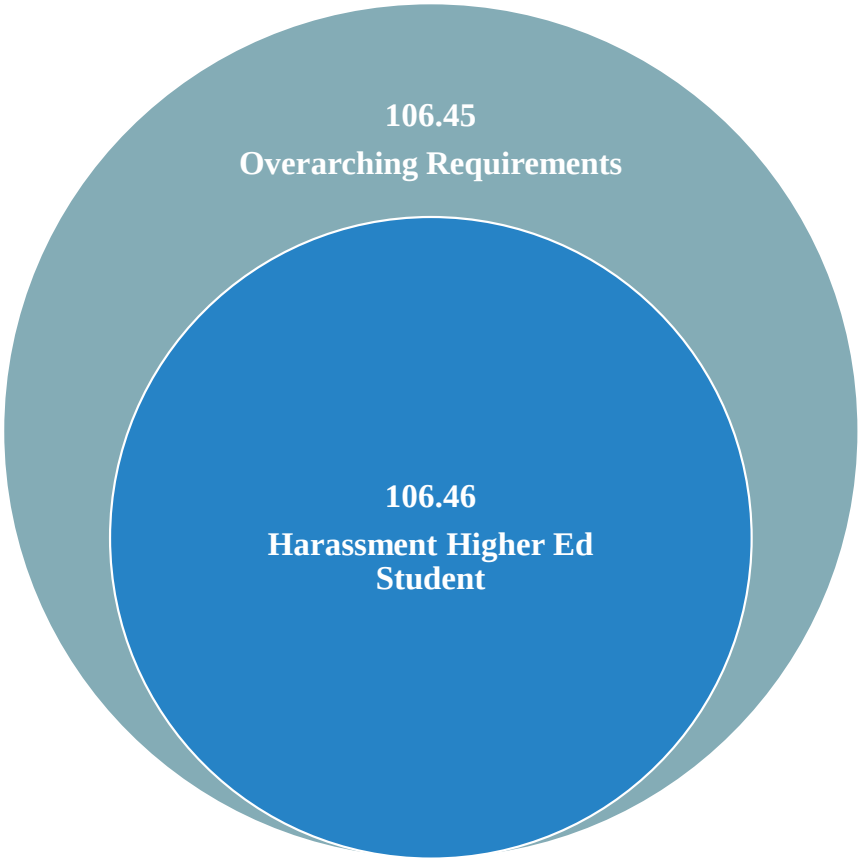
Educational Program or Activity

- **Locations, events, or circumstances where the school exercises substantial control over both:**
  - **the Respondent**
  - **the context in which the alleged sexual harassment or discrimination occurs**
    - **Includes any building owned or controlled by the school or by a student organization that is officially recognized by the school.**
    - **Excludes incidents outside of U.S.**

Grievance Process Requirements

- ✓Treat parties equitably
- ✓No conflict of interest or bias
  - ❖*New: T9C and/or Investigator may be decision-maker*
- ✓Presumption of innocence
- ✓Reasonably prompt timeframes
- ✓Reasonable steps to protect privacy
- ✓Objective evaluation of all relevant evidence
- ✓ Exclude privileged/protected evidence

Proposed Grievance Procedures § 106.45 & § 106.46



How Will Proposed Rules Impact Investigators?

- Greater volume of matters for investigator
  - Expanded scope & jurisdiction
    - Grievance process applies to all forms of discrimination
    - Jurisdiction of rule triggered by “impact” of discrimination
  - Expanded definition of sexual harassment
  - No formal complaint required
- Schools given greater discretion in grievance process details
- Single-investigator model allowed
- Significant overlap in both rules’ basic grievance process requirements
- State law, judicial decisions and overlapping laws continue to apply
- Overarching fairness/due process rights establish expectations and best practices

Conducting Impartial & Objective Investigations

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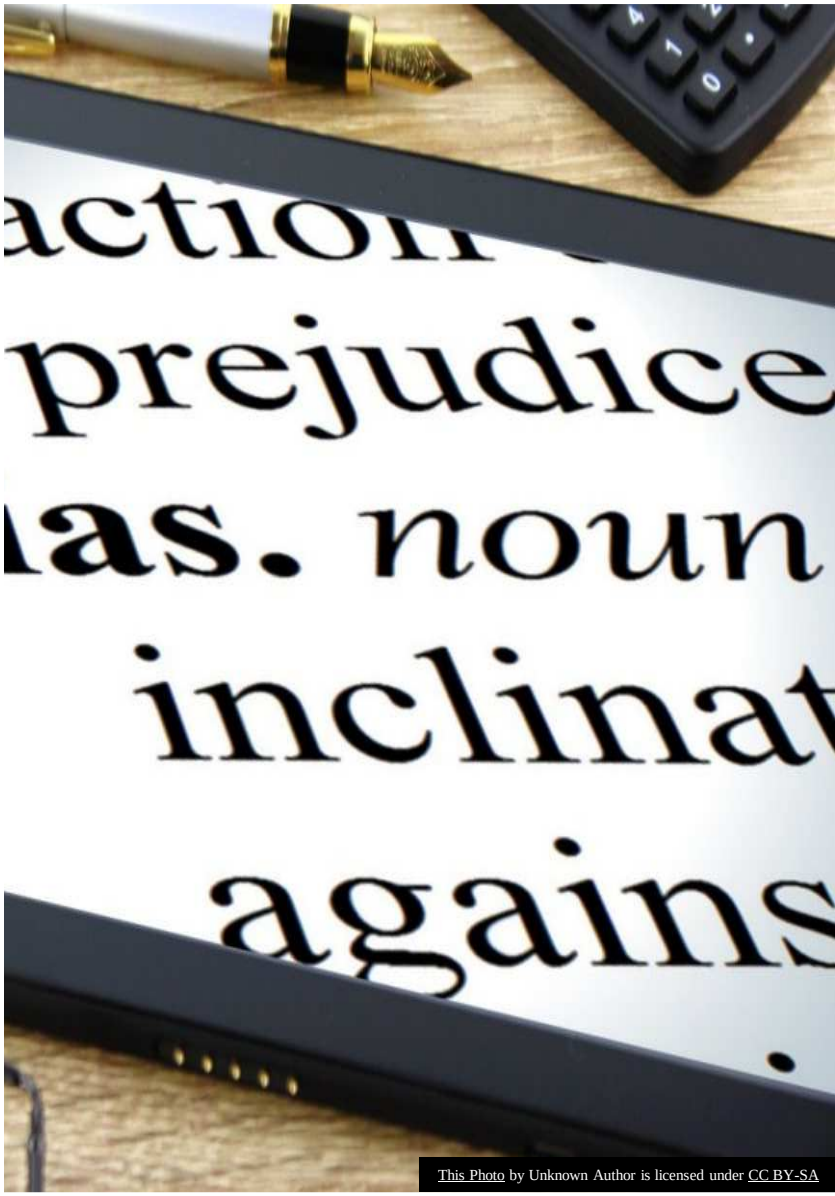
Rules Require Title IX Personnel:

- Avoid prejudgment of the facts
- Avoid bias
- Avoid conflicts of interest
- Maintain a presumption of non-responsibility until after investigation and final determination by neutral decision-maker

Conflicts of Interest and Bias

- Schools must have process to ensure no conflict/bias
- May provide a process for parties to assert claims of conflict/bias during the investigation
- Conflict & bias of Title IX personnel is a basis for appeal



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Conflicts of Interest

- When an individual's personal interests – family, friendships, financial, or social factors – could compromise his or her judgment.
- Investigators must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- Types of Conflicts:
  - Financial Conflicts
  - Personal Relationships
  - Professional Interest

Actual & Perceived Conflict of Interest

- Actual Conflict
  - Circumstances exist which would reasonably prevent you from objectively investigating a matter
  - If you have an actual conflict, you should recuse yourself

- Perceived Conflict
  - Circumstances exist that would cause a reasonable person with knowledge of those circumstances to believe that you have an actual conflict
  - If you have the appearance of conflict, probably recuse yourself

Bias

- What is Bias?
- Confirmation bias
- Conscious/unconscious
- Rule prohibits bias for or against complainants or respondents generally or for or against individual parties in a Title IX case

How to Avoid Bias and Conflicts

- Self-Awareness and Continuous Learning
  - https://implicit.harvard.edu/implicit/takeatest.html
- Transparency/Disclosure
- Seeking Second Opinions
- Standardization
- Documentation: Show Your Work
- Regular Review and Feedback

Pillars of a Good Investigation

- Impartial
- Thorough
- Equitable
- Prompt

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Steps in the Investigation Process

- Formal Complaint
- Notice of Allegations
- Investigation Plan/Strategy
- Interviews/Evidence Collection
- Follow-up
- Parties Review/Inspection and Comment on All Evidence (10 days)
- Draft Investigation Report: Investigator integrate input as applicable in final report
- Distribute Final Report 10 days prior to hearing

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Investigation: Rights of the Parties

- Opportunity to Present Evidence & Witnesses
- Cannot Restrict Parties Right to Discuss Case
- Right to an Advisor
- Notice & Opportunity to Prepare
- Right to Review All Related-to Evidence
- Right to Review Investigation Report
- Burden on School Not on Parties
- Neutrality & Impartiality

Reasonably Prompt Timeframes 106.45(b)(1)(v)

- Administrative Delay
  - *School's inefficiency not good cause*
- Availability of Parties & Witnesses
- Law Enforcement Activity
- Accommodations for Disabilities
- Language Assistance

Creating an Investigation Plan

- Direction & Focus
- Resource Management
- Compliance & Risk Mitigation
- Evidence Integrity
- Accountability & Transparency
- Adaptability
- Coordination
- Efficiency

Creating an Investigation Plan

- Determine the scope of the investigation
- Establish a preliminary timeline of events
- Identify important testimony and evidence
- Develop an initial witness list
- Determine order in which to interview the accused and witnesses

Interviewing Parties & Witnesses

Interviews: Setting the Stage

- Pre-meeting communications begin to establish rapport
- Provide advisor policy prior to interview
- Interviews should be conducted in a private location with no interruptions; try to make the interviewee feel comfortable
- Provide a brief explanation of the institution's investigatory process
- Advise interviewees of the anticipated time frame for completing the investigation
- Explain what, if any, information might be shared with others
- Explain the institution's prohibition on retaliation

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Interviewing Tips

- Active Listening
- Building rapport
- Open-ended questions
- Use language carefully
- Unconscious bias
- Empathy/neutrality
- Consistency

Don’t: Use overly “legalistic” or formal language

Do: Balance empathy with objectivity; establish rapport while maintaining professionalism

Don’t: Avoid difficult or embarrassing questions because they are uncomfortable

Do: Use tact and sensitivity, but can’t skip important details

Don’t: Ask leading questions based on what you think probably happened

Do: Allow the details and facts to come out first, then follow-up with additional clarifying questions as you learn more

Don’t: Make promises you can’t keep, or set unrealistic expectations

Do: Be clear about the process including the limits on “confidentiality”

Don’t: Interrupt, ask “blaming” or biased questions, or fill in the gaps with your own assumptions

Do: Ask open ended questions and allow interviewee to provide their story in their own words…allow space to let them speak

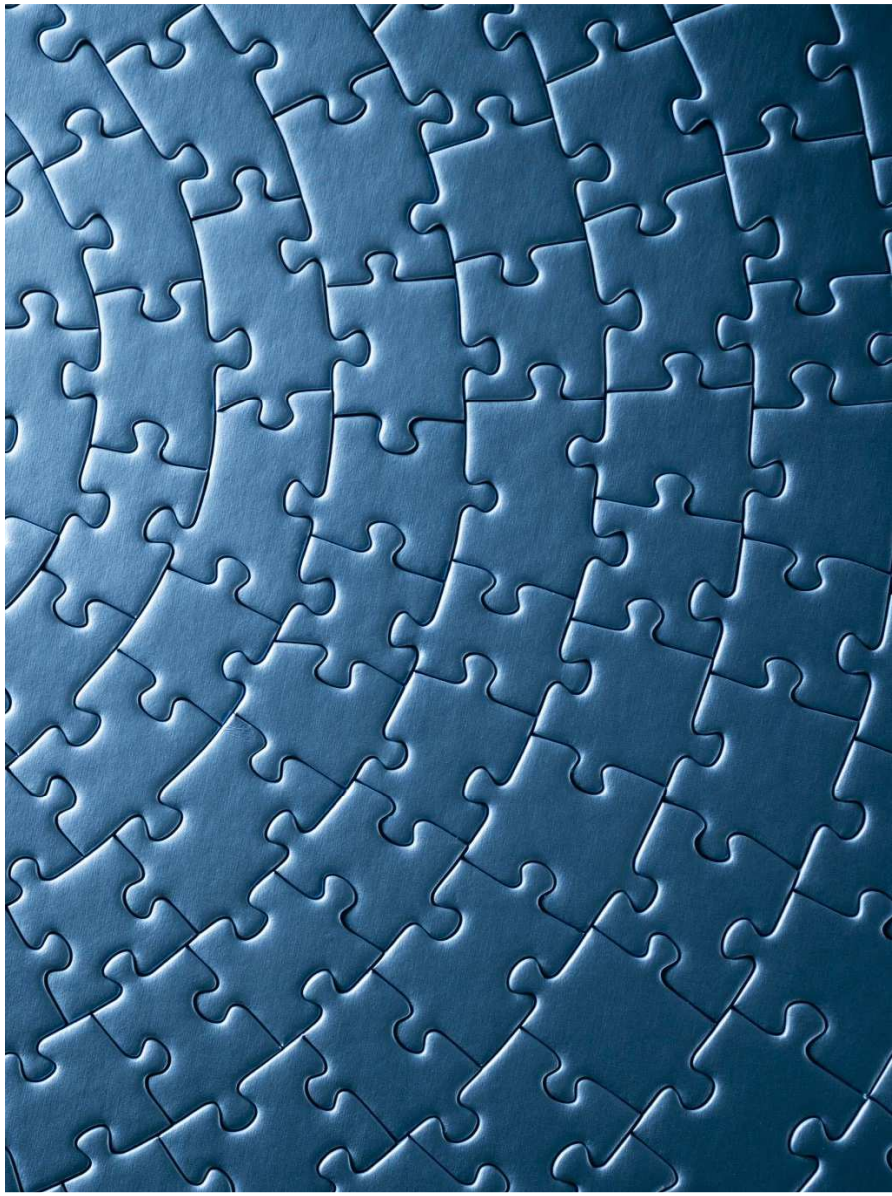
Don’t: Treat the interview like an interrogation or inquisition

Do: Ensure you remain objective and keep your role in context, this is an administrative process, not a law enforcement investigation

Don’t: Allow subconscious or unconscious bias or preconceived beliefs to taint your objectivity

Do: Take a moment before each interview to consciously affirm that you will keep an open mind throughout the process, gather all of the evidence first, and then analyze it in context

Evidence



Evidence Basics

- School carries the burden of evidence
- Investigator must collect all evidence related-to allegations
- Only relevant evidence may be considered by Decision-Maker
- Privileged evidence is not admissible without consent
- Medical records, mental health records are not admissible without consent
- No other restrictions on evidence (legal rules don’t apply)
- Parties have the right to inspect the evidence
- School may develop guidelines re: evaluating evidence (weight,etc.), as long as don’t contravene rules

Directly Related Evidence

- Evidence that is directly related to the allegations in the formal complaint
- Includes evidence that the institution does not intend to rely upon in reaching a determination regarding responsibility
- Includes inculpatory and exculpatory evidence, whether obtained from a party or other source

Remember……

Accepting evidence directly related to the allegations does not mean that the evidence is necessarily trustworthy, reliable, relevant, will carry any weight, or will even be considered by the Decision-Maker; the quality of the evidence and its relevance will be determined later in the process.

Relevant Evidence

- Evidence is considered relevant “if it has the tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action”

- When in doubt err on the side of inclusion

Relevant Evidence May Include…..

- Investigators must also accept the following evidence if offered and directly related to the allegations in the formal complaint:
- Expert witness testimony, reports, or findings Section 106.45 (b)(5)(ii)
- Evidence related to character 85 Fed. Reg. 30247
- Evidence related to the findings of a polygraph examination 85 Fed. Reg. 30247
- Evidence gathered by law enforcement in the course of a concurrent criminal investigation, if available 85 Fed. Reg. 30303

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Privileged Evidence Inadmissible

Not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege in writing.

- ✓Patient-doctor
- ✓Attorney-client
- ✓Spousal privilege
- ✓Priest-penitent

Relevancy, "Rape Shield" Protections & Exceptions

- Questions and evidence about the complainant's sexual predisposition is not relevant and never allowed. Evidence related to prior sexual behavior is also not relevant *unless*:
  - offered to prove
    1. "Mistaken Identity"
       - that someone other than the respondent committed the conduct alleged by the complainant, or
    2. Consent
       - concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

Evidence Logs

- A brief description of the evidence;
- The source of the evidence (i.e., how was the evidence discovered or by whom was it offered);
- Whether the investigator deems the evidence to be a) directly related to the allegations in the formal complaint; b) directly related but not relevant, or c) neither directly related nor relevant.
- Whether the evidence was included in the compilation of evidence shared with the parties, and whether it was redacted, in whole or in part when it was shared;
- The reason(s) for (a) the investigators classification of the evidence as relevant, directly related, or neither, and (b) for redactions, if any.

Right to Review Evidence & Investigation Report

EVIDENCE	INVESTIGATION REPORT
Before Report Finalized	After Report Finalized
ALL evidence "related-to"	Relevant Evidence Only
Send to Both to Party & Advisor	Send to Both to Party & Advisor
Electronic or Hard Copy	Electronic or Hard Copy
10-day Review	10-day Review
Must Consider Input	Discretion to Make Changes

Best Practices for Sharing Evidence

Use one consistent method

Secure file sharing software

Record-Keeping

Investigative File

- Applicable policies and procedures
- Notice of Allegations
- Correspondence
- Evidence file
- Evidence log
- Privilege log
- Unattainable evidence

Writing the Investigative Report

Must fairly summarize the relevant evidence

- Have discretion to determine what format or what other elements to include if any.

- Additional information useful from a practical perspective, i.e. providing sufficient background info/context to understand the evidence, to satisfy record-keeping requirements and document process was thorough, fair, etc.

The Purpose of the Report

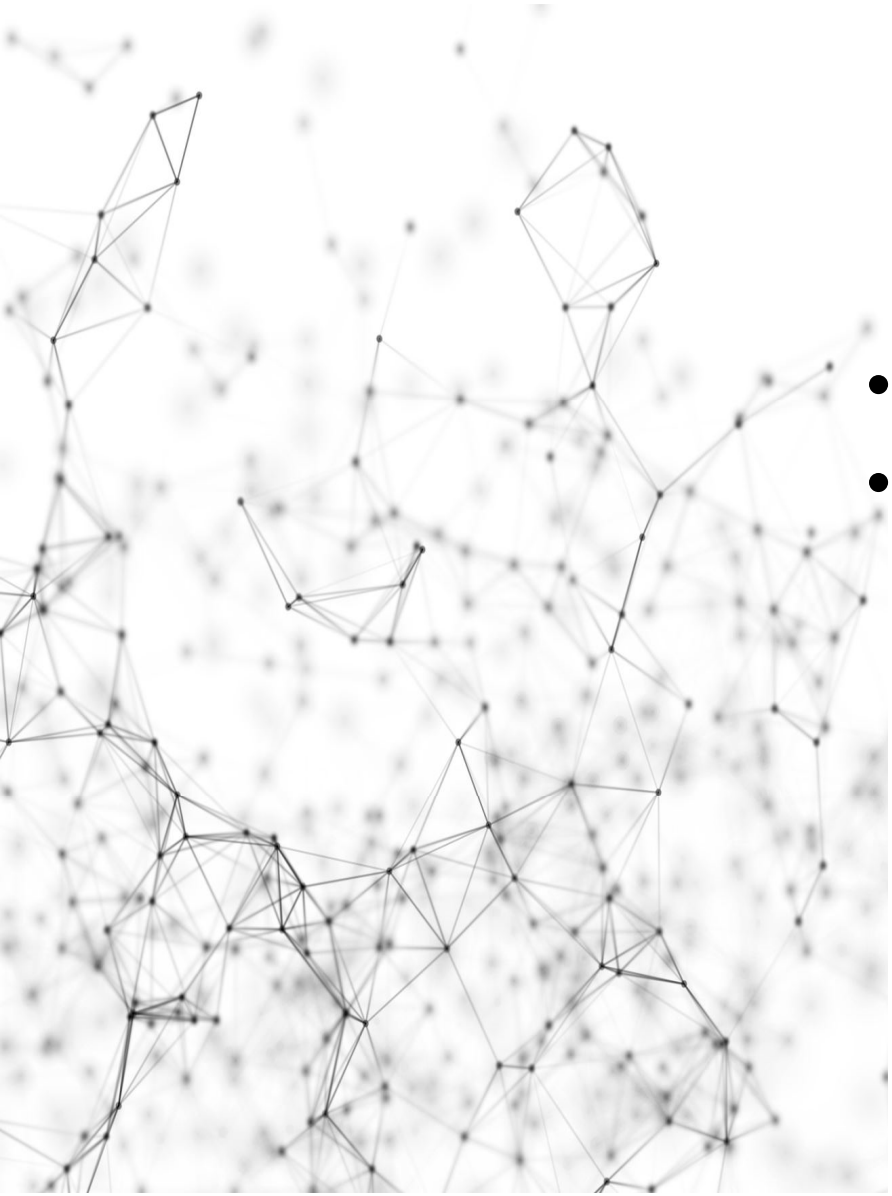
- To ensure that the recipient gives the parties meaningful opportunity to understand what evidence the investigator has collected and believes is relevant.
- To allow the parties opportunity to advance their own interests for consideration by the decision-maker.
- To give the parties (and advisors who are providing assistance and advice to the parties) adequate time to review, assess, and respond to the investigative report in order to fairly prepare for the live hearing.
- To allow the decision maker to adequately prepare for the live hearing, where one is conducted.
- To reduce the likelihood of bias in the final outcome by providing the parties and the decision maker(s) an opportunity to identify and explore potential bias by the investigator.

Report Audience

- Intended Recipients
- Unintended Audience

Anatomy of an Investigative Report

- Body & Appendices
  - Use a consistent approach/template
- Intro/Overview
- Jurisdiction/Scope of Investigation
- Applicable P&P
- Procedural History
  - Investigative Timeline
- Evidence (Related-to & Relevant)
- Summary of Relevant Evidence



Connecting the Dots

- Elements of Policy Violation
- Facts support or negate each element

Redactions

- May redact information not relevant to the allegations or otherwise disallowed
- Maintain an unredacted copy of the evidence with rationale for redaction
- Sensitive items (nude images, videos), may redact identifying features/pixelating graphic information.

Synthesizing & Summarizing the Evidence

- Sufficiency of Detail and Specificity
- Internal Consistency/Consistency Over Time
- Consistency with Other Evidence or Testimony
- Corroboration
- Material Omission
- Inherent Plausibility
- Motive to Falsify
- Past Record
- Ability to Recollect Events

But wait….there's more

- Human memory is flawed
- We're not great lie-detectors
- Unconscious bias is unavoidable
- Demeanor not very good indicators of reliability
- So…..when summarizing/evaluating always refer to Evidence
  - Avoid presumptions, conclusions, supposition, conjecture
- The "Decision"-maker makes "decisions" and assesses credibility

Synthesizing & Summarizing the Evidence

- Avoid conclusions
- Watch out for biased language
- Use quotations
- Avoid generalizations
- Avoid jargon/slang
- Use footnotes, appendices, exhibits

Making Conclusions

Decision-maker must objectively evaluate the evidence

- Rules specifically disallow single-investigator model.
- Carefully consider how recommendations/conclusions (if any) are presented by investigator.

"The scale of justice does not balance on its own; it demands a hand that is steady, eyes that see beyond the surface, and a will committed to the truth." –

Anonymous

Questions?